

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Time Warner Entertainment-Advance/Newhouse)	CSR 5701-E
Partnership, d/b/a Time Warner Cable)	
)	
Petition for Determination of Effective)	
Competition in Austin, Texas (CUID No. TX0029))	

MEMORANDUM OPINION AND ORDER

Adopted: March 12, 2007

Released: March 13, 2007

By the Deputy Chief, Policy Division, Media Bureau:

I. INTRODUCTION

1. Time Warner Entertainment-Advance/Newhouse Partnership, d/b/a Time Warner Cable ("Time Warner") has filed with the Commission a petition pursuant to Sections 76.7, 76.905(b)(4) and 76.907 of the Commission's rules seeking a finding of effective competition in Austin, Texas ("Austin" or the "City").¹ Time Warner alleges that its cable system serving Austin is subject to effective competition pursuant to Section 623(a)(2) of the Communications Act of 1934, as amended ("Communications Act"),² and the Commission's implementing rules, and seeks revocation of the certification of the local franchising authority in the community to regulate basic cable service rates. Time Warner claims the presence of effective competition in the community from the competing services provided by Grande Communications, Inc. ("Grande"), a franchised cable operator affiliated with a local exchange carrier ("LEC"), that also provides service to the community.³ The City of Austin filed an opposition to which Time Warner replied.⁴ Time Warner also filed a Supplement and Further Supplement.

2. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition,⁵ as that term is defined by Section 76.905 of the Commission's rules.⁶ The cable operator bears the burden of rebutting the presumption that effective competition does not exist with

¹See 47 C.F.R. § 76.7(a)(1) and 76.905(b)(4). The City of Austin is certified to regulate basic cable service rates.

²47 U.S.C. § 543(a)(2).

³47 U.S.C. § 543(a); 47 C.F.R. § 76.905(b)(4).

⁴Although Austin filed its opposition late, Time Warner does not object. See Time Warner Reply to Opposition of the City of Austin at 1. Grande also filed an opposition, however, it was subsequently withdrawn.

⁵47 C.F.R. § 76.906.

⁶47 C.F.R. § 76.905.

evidence that effective competition is present within the relevant franchise area.⁷ Based on the record in this proceeding, Time Warner has met this burden.

II. DISCUSSION

3. Section 623(l)(1)(D) of the Communications Act provides that a cable operator is subject to effective competition, and therefore exempt from cable rate regulation, if a LEC or its affiliate offers video programming services directly to subscribers by any means (other than direct-to-home satellite services) in the franchise area of an unaffiliated cable operator which is providing cable service in that franchise area, provided the video programming services thus offered are comparable to the video programming services provided by the unaffiliated cable operator in that area.⁸

4. The Commission has stated that an incumbent cable operator could satisfy the “LEC” effective competition test by showing that the LEC is technically and actually able to provide services that substantially overlap the incumbent operator’s service in the franchise area.⁹ The incumbent also must show that the LEC intends to build-out its cable system within a reasonable period of time if it has not already done so; that no regulatory, technical or other impediments to household service exist; that the LEC is marketing its services so that potential customers are aware that the LEC’s services may be purchased; that the LEC has actually begun to provide services; the extent of such services; the ease with which service may be expanded; and the expected date for completion of construction in the franchise area.¹⁰

5. Time Warner operates a cable television system in Austin, Texas for which it seeks a determination of effective competition. Time Warner has provided information demonstrating that Grande Communications Network, Inc., a wholly owned subsidiary of Grande, is a telephone company that provides local exchange and other telephone services within Austin.¹¹ Therefore, Grande’s wholly owned subsidiary Grande Communications Network, Inc. qualifies as a LEC, and Grande qualifies as an affiliate of a LEC for purposes of the LEC effective competition test.¹²

6. In addition to qualifying as a LEC, Grande was awarded a nonexclusive nine-year franchise from Austin to provide cable services throughout Austin commencing on June 20, 2000 and ending on June 20, 2009.¹³ Grande, however, is entitled to extend the franchise until 2015 if it meets certain franchise conditions.¹⁴ Grande has distributed marketing materials targeted to Austin residents informing them that they need only contact Grande for installation of its cable services.¹⁵ Additionally, Grande is required by its franchise agreement to complete construction of an Austin cable system within

⁷See 47 C.F.R. §§ 76.906 & 907.

⁸Communications Act, § 623(l)(1)(D), 47 U.S.C. § 543(l)(1)(D); *see also* 47 C.F.R. § 76.905(b)(4). This fourth statutory effective competition test within Section 632(l) may be referred to as the “LEC” effective competition test.

⁹See *Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996*, 14 FCC Rcd 5296, 5305 (1999) (“*Cable Reform Order*”).

¹⁰*Id.*

¹¹Time Warner Petition at 2-3 & Exhibit B.

¹²See 47 U.S.C. § 543(l)(1)(D); 47 U.S.C. § 153(a)(1).

¹³Time Warner Petition at 6 & Exhibit C at 7.

¹⁴*Id.*

¹⁵*Id.* at 6-7 and Exhibit A.

five years pursuant to a build-out plan set forth in the franchise agreement, or suffer daily liquidated damages for failure, secured by a \$1 million performance bond.¹⁶

7. Grande's marketing materials show that its cable system offers over 100 channels of video programming that includes non-broadcast programming services such as A&E, CNN, Discovery Channel, HBO and Showtime, as well as a complement of over seven local television broadcast stations.¹⁷ This complement of programming services compares closely with the programming available on Time Warner's system.¹⁸ Therefore, Grande provides comparable programming as required by the LEC effective competition test.¹⁹

8. In opposition, the City of Austin does not dispute that Grande is affiliated with a LEC or provides comparable services to Time Warner, it does however doubt that Grande offers services to the extent required by the LEC test.²⁰ The City of Austin argues that while there is no penetration percentage under the LEC test, the term "offer" in the Cable Act requires that the LECs must substantially overlap the services of the incumbent cable operator and Grande's service does not substantially overlap Time Warner's.²¹ According to the City, Grande offers service to less than five percent of Austin households while Time Warner's service passes all Austin households.²² Finally, Austin alleges that while Grande's service offering is not widespread, it has caused Time Warner to target former customers with anti-competitive pricing in violation of Section 76.984(a)²³ of the Commission's rules and is intended to prevent Grande's competitive presence.²⁴ Therefore, Austin argues that it is premature to declare Austin subject to effective competition.

9. In reply, Time Warner notes that the City concedes that Time Warner has met the LEC-affiliation and comparable programming prongs of the LEC test and that there is no minimum homes passed or penetration requirement.²⁵ Nevertheless, Time Warner disputes the City's claim that the market "is not yet sufficient to constitute effective competition."²⁶ Time Warner alleges that Grande "has or soon will have constructed a very significant portion of its system serving Austin."²⁷ Time Warner argues that under the Commission decision in *Cablevision of Boston, MA*,²⁸ the extent of Grande's build-out is sufficient to satisfy the LEC test.²⁹ Finally, Time Warner disputes the City's claim that its promotional

¹⁶*Id.* at 4-5 fn 4 and Exhibit C at 31.

¹⁷*Id.* at 7-8 and Exhibit A.

¹⁸*Compare id.* and Time Warner Petition at 7-8 and Exhibit D.

¹⁹*See* 47 C.F.R. § 76.905(g).

²⁰Opposition at 2-4.

²¹*Id.* at 2.

²²*Id.*

²³47 C.F.R. § 76.984(a).

²⁴Opposition at 4-5.

²⁵Time Warner Reply at 2.

²⁶*Id.*

²⁷*Id.* n. 6.

²⁸16 FCC Rcd 14,056

²⁹Time Warner Reply at 4.

campaign violated the uniform rate requirement of the Commission's rules.

10. In December 2005, the Commission requested that the parties update the record.³⁰ In response, Time Warner filed a Supplement and Further Supplement. Grande withdrew its opposition.³¹ The City did not file a response to either Time Warner's Supplement or Further Supplement.

11. Time Warner's Supplement argues that Grande's competitive viability remains strong as evidenced by its financial prosperity and continued expansion and purchase of related entities.³² Time Warner cites various public filings to buttress its claim that Grande continues to be financially viable and continues to expand.³³ Time Warner states that Grande's public filings reflect a 9 percent increase of marketable homes passed and the number of customers served has increased by almost 11 percent.³⁴ Moreover, Grande now offers service to 87,776 households, representing approximately 27 percent of the City.³⁵ Time Warner notes that in 2006, Grande converted its city-issued cable franchise into a state-issued Certificate of Authority under Texas' recently adopted State-Issued Certificate of Authority statute.³⁶ Time Warner further notes that Grande continues to offer multichannel video and full service telephone service in Austin that bundles local and long distance service at a discounted rate.³⁷ In addition, Grande is updating its high-speed broadband distribution network in Austin to offer more features and expand its broadband services to customers and is deploying a passive optical FTTH network in Austin, which is expected to pass 23,000 homes in 2006.³⁸ Time Warner alleges that these services offered by Grande operate in direct competition with its own services. Thus, all evidence indicates that Grande continues to have a significant and growing number of video subscribers in the Austin franchise area.

12. Time Warner's Further Supplement indicates that it researched the current state of Grande's build-out of its Austin system.³⁹ The research included a physical plant inspection, engineering review, and the creation of a detailed map by Time Warner's local personnel in Austin. Time Warner provided a map of the City limits and highlighted Grande's system build-out as well as portions of the City under construction by Grande.⁴⁰ According to Time Warner, Grande now serves "approximately twenty-

³⁰December 13, 2005 Letter from Steven A. Broeckaert, Deputy Chief, Policy Division, Media Bureau to Arthur H. Harding of Fleischman and Walsh, L.L.P., counsel for Time Warner, et al.

³¹January 10, 2006 Letter from Emily A. Denney of Cinnamon Mueller, counsel for Grande Communications, Inc. to Marlene Dortch, Secretary, Federal Communications Commission.

³²Time Warner Supplement at 3-5.

³³*Id.* Grande's operations, as reflected in publicly filed documents with the Securities and Exchange Commission, reflect strong growth and financial stability based on revenues, earnings, and Grande's projection of continuous rapid growth. Furthermore, Grande has been able to obtain financing to allow it to continue to grow as evidenced by its acquisition of U.S. Online Inc., an MDU-focused MVPD with subscribers in Austin and San Antonio in 2001 and over-builder ClearSource, Inc., with operations throughout Texas.³³ In 2003, Grande purchased 3000 miles of fiber spanning Texas, Oklahoma, Arkansas, and Louisiana from Austin-based C3 Communications.

³⁴*Id.* at 4.

³⁵*Id.*

³⁶*Id.* at 5-6.

³⁷*Id.*

³⁸*Id.*

³⁹*Id.* at 7-8.

⁴⁰*Id.*

five percent of the overall municipal territory of Austin, with construction into other parts of the city ongoing.”⁴¹ Thus, Time Warner asserts that this information is consistent with the information contained in the Supplement asserting that Grande has 11,928 cable subscribers in Austin. Time Warner contends that Grande’s 25 percent build-out is well over the LEC competitor’s 15 percent build-out that the Commission deemed more than sufficient to establish effective competition under the LEC test in *Kansas City Cable Partners*.⁴²

13. Finally, Time Warner argues that in addition to Grande, MVPD competition is provided by DBS providers, DirecTV and DISH Network.⁴³ Time Warner requested and received zip code, occupied household and DBS subscriber data from Media Business Corp. for the City and DBS subscriber data from the Satellite Broadcasting and Communication Association.⁴⁴ Using this data, Time Warner applied the five-digit zip code allocation formula previously approved by the Commission and the evidence indicated that DBS providers serve 10.58 percent of the total households in Austin. Time Warner therefore argues that the combination of DBS and Grande subscribers reflect that 15.07 percent of Austin households subscribe to an MVPD other than Time Warner.⁴⁵ Thus, Time Warner argues that it is arguably also subject to competing provider effective competition in Austin.

14. The City has conceded that Grande’s operations satisfies all of the LEC test requirements except for the “offer” of services, which it asserts won’t be satisfied until its system substantially overlaps that of Time Warner’s service area. When the petition was filed, Grande offered service to 13,000 households. Since that time, however, Grande has continued to expand the number of subscribers and made major improvements to its system to compete with the other multichannel video programming distributors serving Austin. Although the map submitted by Time Warner is useful in documenting Grande’s build-out, we are unable to verify the twenty-five percent build-out number asserted by Time Warner. The map is, however, evidence that supports Time Warner’s argument that Grande continues to build-out its system and add subscribers. Time Warner has also produced evidence to indicate that Grande remains on a solid financial footing. We believe that Time Warner has satisfied its burden of demonstrating that Grande’s service is “offered” in the Austin franchise area consistent with the LEC effective competition test. In addition, Time Warner has presented evidence that there are at least 28,105 DBS subscribers in the City. This is additional evidence that Austin residents have a growing choice among multichannel video programming distributors.

15. Time Warner demonstrated that Grande has commenced providing cable service within Austin, has marketed its services in a manner that makes potential subscribers reasonably aware of its services, and otherwise satisfies the LEC effective competition test consistent with the evidentiary requirements set forth in the *Cable Reform Order*.⁴⁶ Based on the foregoing, we conclude that Time Warner has submitted sufficient evidence demonstrating that its cable system serving Austin, Texas is subject to LEC effective competition.

⁴¹*Id.*

⁴²18 FCC Rcd 14187 (2003).

⁴³Time Warner Supplement at 8-9.

⁴⁴*Id.*

⁴⁵*Id.* at 9.

⁴⁶14 FCC Rcd at 5305.

III. ORDERING CLAUSES

16. Accordingly, **IT IS ORDERED** that the petitions for a determination of effective competition filed by Time Warner Entertainment-Advance/Newhouse Partnership, d/b/a Time Warner **IS GRANTED**.

17. **IT IS FURTHER ORDERED** that the certification of the City of Austin to regulate basic cable service rates of Time Warner Entertainment-Advance/Newhouse Partnership, d/b/a Time Warner Cable **IS REVOKED**.

18. This action is taken pursuant to delegated authority pursuant to Section 0.283 of the Commission's rules.⁴⁷

FEDERAL COMMUNICATIONS COMMISSION

Steven A. Broeckert
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⁴⁷47 C.F.R. §0.283.